STATE OF MICHIGAN

COURT OF APPEALS

LUCIA J. HANSON, Personal Representative of the Estate of NELS THOMAS HANSON, Deceased,

Plaintiff-Appellant,

v

DALLAS JOSEPH SULLIVAN,

Defendant,

and

BOARD OF COUNTY ROAD COMMISSIONERS OF MECOSTA COUNTY,

Defendant-Appellee.

UNPUBLISHED
June 9, 2000

No. 217869
Mecosta Circuit Court
LC No. 96-011467-NI

Before: Jansen, P.J., and Hoekstra and Collins, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(7), (8), and (10)[1]. We affirm in part, reverse in part, and remand for further proceedings.

I

This case arises out of a head-on automobile collision that occurred on August 3, 1994, on an unpaved road in Mecosta County. Plaintiff's complaint, filed in March 1996, alleges that Nels Hanson (plaintiff's son) was driving south on 160th Avenue when defendant Dallas Joseph Sullivan, who was traveling in the opposite direction, crossed the center of the road and collided with Hanson. Hanson suffered from a severe closed head injury, multiple fractures, multiple lacerations, and died the following day. According to the complaint, the collision occurred when both automobiles were approaching a hill and, because of the limited sight distance caused by the hill, Hanson had no opportunity to avoid the collision. Plaintiff's allegations against the Board of County Road Commissioners of Mecosta County

(hereafter referred to as defendant because Sullivan is not a party to this appeal) are maintenance of a defective highway and nuisance per se.

Defendant moved for summary disposition. With regard to the defective highway claim, defendant argued that it was immune from liability under MCL 691.1402; MSA 3.996(102) because its duties to maintain a highway do not encompass those alleged by plaintiff, it did not breach any of its duties, there was no evidence to substantiate the claim that the highway was defective, and even if a highway defect existed, it was not the proximate cause of Hanson's injuries. With regard to the nuisance per se claim, defendant argued that there is no nuisance per se exception to governmental immunity and, therefore, plaintiff's complaint failed to state a claim upon which relief could be granted. The trial court ultimately granted the motion.

We review de novo the trial court's ruling on a motion for summary disposition. *Horace v Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998).

II

Plaintiff first argues that the trial court erred in granting summary disposition in favor of defendant on the defective highway claim.

In her complaint, plaintiff alleged that defendant breached the following duties:

> a. Failing to keep the improved, travelled [sic] portion of 160th Avenue in a reasonable state of repair and reasonably safe and convenient for public travel;
>
> b. Failing to grade and profile 160th Avenue on the hill north of 22 Mile Road to conform to the applicable standards for sight distance;
>
> c. Maintaining the grade and profile of 160th Avenue on the hill north of 22 Mile Road so that southbound motorists did not have a safe sight distance as they climbed the hill;
>
> d. Failing to provide adequate warning to southbound motorists of the limited sight distance on the hill north of 22 Mile Road;
>
> e. Failing to reduce the speed limit on 160th Avenue in recognition of the danger posed by the limited sight distance;
>
> f. Failing to maintain 160th Avenue at a proper and adequate width given the limited sight distance caused by the grade and profile of the hill to provide motorists reasonable margins of error in their driving patterns and allow oncoming vehicles to safely pass each other at the crest of the hill;
>
> g. Failing to provide proper or adequate shoulder area for emergency use by motorists climbing the hill; and

h. Carelessly and negligently breaching its statutory duties.

The defective highway exception to governmental immunity, MCL 691.1402(1); MSA 3.996(102)(1), requires governmental agencies to maintain highways in reasonable repair so that they are reasonably safe and convenient for public travel. Plaintiff states in her appellate brief that the "gravamen of [the] complaint against the Road Commission is that 160th Avenue was not reasonably safe at the hillcrest where the accident occurred because it did not provide adequate site distance to allow her son to avoid the accident." Consequently, plaintiff focuses only on paragraph d; namely, that defendant failed to provide adequate warning to motorists of the limited sight distance on the hill. Therefore, we consider the remainder of plaintiff's allegations to be waived and do not address them.

In *Pick v Szymczak*, 451 Mich 607, 621; 548 NW2d 603 (1996), our Supreme Court, in interpreting MCL 691.1402; MSA 3.996(102), held that the duty of maintenance includes the duty to erect adequate warning signs or traffic control devices at a point of hazard, or a point of special danger.

> We define "point of hazard" (or "point of special danger") as any condition that directly affects vehicular travel on the improved portion of the roadway so that such travel is not reasonably safe. To be a point of hazard for purposes of the highway exception, the condition must be one that uniquely affects vehicular travel on the improved portion of the roadway, as opposed to a condition that generally affects the roadway and its surrounding environment. We reemphasize, however, that such conditions need not be physically part of the roadbed itself. [*Pick, supra,* p 623.]

A review of the complaint indicates that plaintiff has alleged sufficient facts giving rise to an exception to governmental immunity under the highway exception under MCL 691.1402(1); MSA 3.996(102)(1), to defeat defendant's motion for summary disposition pursuant to MCR 2.116(C)(7). Our review of the record also indicates that plaintiff's complaint sufficiently alleged all the elements necessary to show negligence and the application of the highway exception such that she stated a cause of action sufficient to defeat defendant's motion for summary disposition pursuant to MCR 2.116(C)(8).

We also find that plaintiff has presented sufficient documentary evidence to create a material factual dispute regarding whether the hill crest was a point of hazard such that defendant had a duty to provide adequate warning signs to motorists. The facts indicate that Hanson and Sullivan were driving in opposite directions on 160th Avenue in the afternoon. The road, which was unpaved gravel at the time of the accident, was dry and was twenty-six feet wide. Both drivers were traveling at about forty to forty-five miles an hour. The Mecosta County Sheriff's report indicated that the speed limit is unposted at fifty-five miles an hour. The report further noted no notable deficiencies in the road surface that would have contributed to the accident. However, the report specifically notes that the grade for both northbound and southbound vehicles was enough so that neither driver would have been able to see the other until just before reaching the crest. The report additionally found that the northbound vehicle (driven by Sullivan) had the driver's side tires in the center of the road, and that the southbound vehicle (driven by Hanson) was left of the center of the roadway. Another private investigator, however, determined that both drivers were over the center line: Hanson by six inches and Sullivan by twelve inches.

There is additional deposition testimony from William Taylor, PhD, a professor of civil engineering, that an ordinary driver would not be able to determine what the sight distance was, or a safe speed for going over the hill, or precisely where the center line was in order to make appropriate decisions and avoid collisions with other vehicles without resort to extraordinary efforts. Edward Burch, a consulting engineer, also testified at deposition that recognized standards required a stopping distance of 462 feet for the hill crest when designing a road, which is approximately four times longer than 160th Avenue had. Plaintiff's expert, John Glennon, PhD, a civil engineer, testified at his deposition that the grade approach for the northbound driver was 4.6 percent and for the southbound driver was 3.4 percent at the hill crest. He characterized these as moderate grades, but also testified that the length of the vertical curve was one hundred feet which was "a very short vertical curve." Glennon noted that this creates a sight distance problem, and that the vertical curve at fifty-five miles an hour should have been between one and two thousand feet. Based on his survey of the hill crest, Glennon characterized it in his affidavit as a point of hazard because of the limited sight distance available to motorists nearing the hill crest and the inability of an ordinary driver to appreciate the hazard posed by the limited sight distance.

Accordingly, we believe that this evidence is sufficient to raise a question of fact regarding whether the hill crest constituted a point of hazard such that defendant was negligent in failing to post any warning signs on the road. See, e.g., *Pick, supra,* (vegetation that visually obstructed an intersection constituted a point of hazard); *Meek v Dep't of Transportation,* ___ Mich App ___ ; ___ NW2d ___ (Docket No. 202971, issued March 3, 2000) (connector ramp between two major interstate highways in the Detroit area that had a vertical incline and, at the crest, declined into a horizontal curve was a point of hazard); *McIntosh v Dep't of Transportation,* 234 Mich App 379; 594 NW2d 103 (1999) (grassy center median of interstate highway in Detroit was a point of hazard); *Iovino v Michigan,* 228 Mich App 125; 577 NW2d 193 (1998) (a red light before a railroad crossing changed to a flashing yellow light when a train approached and vehicles were required to cross the railroad tracks before completing a right-hand turn constituted a point of hazard); *McKeen v Tisch (On Remand),* 223 Mich App 721; 567 NW2d 487 (1997) (severed tree limb hanging over a road constituted a point of hazard).

Moreover, we agree with plaintiff that the trial court engaged in improper factfinding when ruling on the motion for summary disposition. *Skinner v Square D Co,* 445 Mich 153, 161; 516 NW2d 475 (1994); *Iovino, supra,* p 136. The trial court ruled first that the road commission had no obligation to make a reasonably safe road safer, and that the proximate cause of the accident was that one of the vehicles crossed the center line. However, we have already indicated that plaintiff has presented sufficient documentary evidence indicating that the hill crest constituted a point of hazard. Further, the issue of proximate cause is usually for the trier of fact and is not to be decided by summary disposition. *Rogers v Detroit*, 457 Mich 125, 141; 579 NW2d 840 (1998). There may be more than one proximate cause of an injury and when a number of factors contribute to producing an injury, one can still be a proximate cause if it is a substantial factor in bringing about the injury. *Hagerman v Gencorp Automotive,* 457 Mich 720, 737; 579 NW2d 347 (1998). The question of which, if either, vehicle was over the center of the road is clearly in dispute because the sheriff's report indicates that Hanson was over the center line, but a private investigator's report indicates that both vehicles were over the

center line, and Sullivan testified at his deposition that he did not believe that he was driving over the center line. Thus, there being a factual dispute, the question of proximate cause is similarly a matter for the trier of fact to resolve.

Accordingly, we conclude that the trial court erred in granting summary disposition in favor of defendant with respect to the defective highway claim because there are factual disputes that must be resolved by a jury.

III

Plaintiff next argues that the trial court erred in granting summary disposition in favor of defendant with respect to her claim of nuisance per se.

A nuisance per se is an activity or condition which constitutes a nuisance at all times under all circumstances, without regard to the care with which it is conducted or maintained. *Li v Feldt (After Second Remand)*, 439 Mich 457, 476-477; 487 NW2d 127 (1992); *Palmer v Western Michigan Univ*, 224 Mich App 139, 144-145; 568 NW2d 359 (1997). After review of the record, even assuming there is an exception to governmental immunity for nuisance per se and that plaintiff alleged elements sufficient to state such a claim, we determine that plaintiff's pleadings and other documentary evidence do not support finding there was a genuine issue of material fact regarding the existence of a nuisance per se. In particular, plaintiff's proofs do not show that the road's approaches nearing the hill crest constituted an intrinsically unreasonable or dangerous condition, without regard for care or circumstances. *Li, supra* at 477; *Palmer, supra* at 144-145. Moreover, the road served obvious and beneficial public purposes and was clearly capable of being used by motorists in such a way as not to pose any nuisance at all. *Li, supra* at 477. Consequently, the trial court did not err in granting defendant's motion for summary disposition on this claim.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra
/s/ Jeffrey G. Collins

[1] The trial court's order granting summary disposition in favor of defendant road commission was entered on April 28, 1998. The order was not final for appeal purposes because defendant Sullivan remained in the case. Plaintiff initially sought leave to appeal in this Court, but that application was denied in an unpublished order dated November 2, 1998. The case then went to mediation, and both parties accepted the mediation award of $75,000. The trial court's final order indicating the final settlement between plaintiff and defendant Sullivan was entered February 9, 1999.